

Federal Communications Commission

DA 98-1889

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's Rules
Regarding Multiple Address Systems

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WT Docket No. 97-81
File Nos. A00001-A50772

ORDER

Adopted: September 17, 1998

Released: September 17, 1998

By the Chief, Public Safety and Private Wireless Division:

I. INTRODUCTION

1. By this *Order*, we dismiss all pending Multiple Address System (MAS)¹ applications for use of the 932-932.5/941-941.5 MHz bands (932/941 MHz band), which were filed in anticipation of the Commission awarding licenses for these channels through random selection or lottery. As discussed in further detail below, we take this action as a result of the Balanced Budget Act of 1997,² which, among other things, terminated the Commission's authority to use lotteries to select among competing mutually exclusive applicants for initial licenses or construction permits.

II. BACKGROUND

2. In 1989, the Commission allocated the forty 12.5-kilohertz channel pairs in the 932/941 MHz band currently designated for MAS use by both Federal Government and non-Federal Government entities.³ By *Public Notice*, the Commission announced that it would open five two-day filing windows in early 1992 where all applications would be treated as if they were filed at the same time.⁴ The *Public Notice* provided that applications acceptable for filing would be assigned a number and that a random drawing of the assigned numbers would be conducted for the purpose of "ranking" the applications in

¹ MAS is a point-to-multipoint, multipoint-to-point service licensed under Parts 22 and 101 of the Commission's Rules, 47 C.F.R. Parts 22 and 101. Part 22 refers to the service as point-to-multipoint. See 47 C.F.R. § 22.621.

² Pub. L. No. 105-33, 111 Stat. 251 (1997) (Balanced Budget Act).

³ Amendment of the Parts 1, 21, 22, 74, and 94 of the Commission's Rules to Establish Service and Technical Rules for Government and non-Government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz, GN Docket No. 82-243, *Second Report and Order*, 4 FCC Rcd 2012 (1989).

⁴ Revised Filing Window for Point-to-Multipoint Channels in the 900 MHz Government/non-Government Fixed Service, Public Notice, DA 91-1422, 6 FCC Rcd 7242 (rel. Nov. 27, 1991).

order to determine channel assignment.⁵ If a channel could not be assigned to an applicant because of a prior assignment to a higher ranked applicant, the "lower ranked" application would be set aside to be dismissed.⁶ The process was to continue until all the applications were either assigned a channel or dismissed.⁷ The applications at issue are, therefore, mutually exclusive.⁸ In response to the series of filing windows, over 50,000 applications were submitted.

3. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993⁹ added Section 309(j) to the Communications Act of 1934, as amended.¹⁰ Under the 1993 Budget Act, Section 309(j) permitted the Commission, for certain classes of radio licenses, to employ competitive bidding procedures to choose among mutually exclusive applications for initial license grants or authorizations. As a result, the Commission commenced a proceeding to examine whether licenses for various radio services should be distributed by competitive bidding.¹¹ In that context, the Commission determined at that time that MAS, part of the Private Operational Fixed Microwave (POFM) service,¹² did not qualify as primarily subscriber-

⁵ *Public Notice*, 6 FCC Rcd at 7244; In the Matter of Amendment of Parts 1, 21, 22, 74, and 94 of the Commission's Rules to Establish Service and Technical Rules for Government and non-Government Fixed Service Usage of the Frequency Bands 932-935 and 941-944 MHz GN Docket No. 82-243, *Memorandum Opinion and Order*, 5 FCC Rcd 1624, 1625-26 (1990) (*MAS MO&O*).

⁶ *Public Notice*, 12 FCC Rcd at 7244; *MAS MO&O*, 5 FCC Rcd at 1626.

⁷ *Id.*

⁸ See 47 C.F.R. § 101.45(a). "The Commission will consider applications to be mutually exclusive if their conflicts are such that the grant of one application would effectively preclude . . . grant of one or more of the other applications." *Id.*

⁹ Pub L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993) (1993 Budget Act).

¹⁰ 47 U.S.C. § 309(j) (1993).

¹¹ See In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rule Making*, 8 FCC Rcd 7635 (1993) (*Competitive Bidding NPRM*).

¹² The former Part 94 of the Commission's Rules had contained the rules for POFM service. Part 94 eligibles were persons (individuals, partnerships, associations, joint stock companies, trusts, or corporations), governmental entities, or agencies eligible to provide Private Operational Fixed Service under Parts 80, 87, or 90, or entities proposing to provide such service to POFM eligibles, e.g. on a private carrier basis. The POFM service includes any use of microwave frequencies other than for common carrier purposes (which were governed by then-Part 21). Effective August 1, 1996, however, the Commission consolidated the service rules for fixed microwave operations, e.g., Parts 21 and 94 of the rules, into a single Part 101. See In the Matter of Reorganization and Revision of Parts 1, 2, 21 and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148; Amendment of Part 21 of the Commission's Rules for the Domestic Public Fixed Radio Services, CC Docket No. 93-2, *Report and Order*, 11 FCC Rcd 13,499 (1996).

based, and therefore should not be subject to competitive bidding.¹³ Thus, the Commission decided that it would not be appropriate to use competitive bidding for the award of the POFM licenses for which the 50,000-plus applications were pending, even in the event of mutual exclusivity.¹⁴ Subsequently, the Commission undertook a preliminary examination of the pending applications and ascertained that the vast majority (apparently over 95 percent) were filed by applicants seemingly proposing to use their licenses principally to provide subscriber-based services.¹⁵

4. Because of the overwhelming interest in commercial operations of MAS facilities and the substantial number of applications filed for the 932/941 MHz band, the Commission was concerned that the analysis made in the Competitive Bidding proceeding might have been inaccurate. As a result, in February 1997, the Commission adopted the *MAS Notice* to reexamine current and future uses of, and demand for, MAS spectrum.¹⁶ In the *MAS Notice*, the Commission proposed to streamline the MAS service rules, increase technical and operational flexibility for MAS licensees, license most MAS channels by geographic area, and award mutually exclusive licenses by competitive bidding.¹⁷ To effectuate its new licensing approach effectively, the Commission also proposed to dismiss the pending MAS applications for the 932/941 MHz band without prejudice to refiling under whatever new licensing rules are ultimately adopted.¹⁸

III. DISCUSSION

5. In the *MAS Notice*, the Commission proposed to dismiss the pending MAS applications for the 932/941 MHz band as a result of its proposed changes to the MAS service rules.¹⁹ Notwithstanding the Commission's proposal, when the *MAS Notice* was adopted, the Commission's use of lotteries was still permissible. Consequently, the Communications Act, at that time, did not preclude the possibility of a final decision in this docket that random selection procedures be used to select among the pending 50,000 MAS applications for the 932/941 MHz band. Subsequently, the 1997 Balanced Budget Act eliminated that possibility by terminating the Commission's statutory authority to use lotteries. Section 3002(a) of the 1997 Balanced Budget Act states that, with limited exceptions not applicable to this proceeding, "the

¹³ See *Competitive Bidding NPRM*, 8 FCC Rcd at 7659-60. The Commission stated that, pursuant to 47 U.S.C. § 309(j)(2)(A), in order for a license to be subject to competitive bidding, "the licensee must receive compensation for providing transmission or reception capabilities to subscribers." In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2352 (1994) (*Competitive Bidding Second Report and Order*). Consequently, the Commission excluded "non-subscriber-based" services from competitive bidding. *Id.*

¹⁴ *Competitive Bidding NPRM*, 8 FCC Rcd at 7660 n.156; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2354 n.25.

¹⁵ Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Notice of Proposed Rule Making*, 12 FCC Rcd 7973, 7978 (1997) (*MAS Notice*).

¹⁶ *Id.* at 7974-75.

¹⁷ See *Id.* at 7975.

¹⁸ *Id.* at 7997-98.

¹⁹ *MAS Notice*, 12 FCC Rcd at 7997-98.

Commission shall not issue any license or permit using a system of random selection under this subsection after July 1, 1997."²⁰ As discussed *supra*, the processing rules for these MAS applications are predicated on conducting random selection to determine the order in which we would process the applications. Clearly, we no longer have statutory authority to proceed with this random selection. Additionally, Section 309(j) of the 1997 Balanced Budget Act expanded the Commission's authority -- and statutory mandate -- to use competitive bidding to select licensees from among mutually exclusive applications for any initial license.²¹ There are no exemptions for pending mutually exclusive applications.²²

6. Because the Commission is without authority to process these pending mutually exclusive applications pursuant to the rules and requirements under which they were filed, namely, random selection procedures, we conclude that the applications must be dismissed. Further, because we conclude that this result is unambiguously compelled by statute, this decision may be made pursuant to delegated authority, with no further notice and comment.²³ Rather than wait for the adoption of final MAS service rules in this docket, we believe that it is in the public interest to dismiss the applications at this time. The 1997 Balanced Budget Act has terminated our statutory authority to use lotteries, with no provision for grandfathering, and as a result, maintaining these applications in a pending status would only delay their inevitable dismissal. The applicants will have the opportunity to refile applications for MAS service under new service rules that are fully compliant with the 1997 Balanced Budget Act.²⁴ Thus, we believe that

²⁰ Balanced Budget Act § 3002(a)(2)(B)(5), *codified at* 47 U.S.C. § 309(i)(5) (1997).

²¹ Balanced Budget Act § 3002(a)(1)(A)(1)-(2), *amending* 47 U.S.C. § 309(j) (1997).

²² Section 3002(a) "repeals the Commission's lottery authority for *all* applications other than for licenses for non-commercial educational and public broadcast stations as defined in section 397(6) of the Communications Act." Conference Report on H.R. 2015, Balanced Budget Act of 1997, H.R. Conf. Rep. No. 105-217, 143 Cong. Rec., H6173 (daily ed. July 29, 1997) (emphasis added).

²³ We have determined that the directives of Congress and the public interest will be served by the dismissal of the subject applications. The due and timely execution of the Commission's responsibilities would be unnecessarily impeded by a time consuming notice and comment period. Accordingly, we will not conduct a notice and comment proceeding regarding dismissal of the subject applications. *See National Customs Brokers and Forwarders Association of America, Inc. v. U.S.*, 59 F.3d 1219, 1223 (Fed. Cir. 1995).

²⁴ Applicants can apply to the Office of Managing Director of the Federal Communications Commission for the refund of filing fees. *See* 47 C.F.R. § 1.1113. Section 1.1113(a) of the Commission's rules provides, in relevant part, as follows --

The full amount of any fee submitted will be returned or refunded, as appropriate, in the following circumstances:

- (1) When no fee is required for the application or other filing.
- (2) When the fee processing staff or bureau/office determines that an insufficient fee has been submitted within 30 calendar days of receipt of the application or filing and the application or filing is dismissed.
- (3) When the application is filled by an applicant who cannot fulfill a prescribed age requirement.
- (4) When the Commission adopts new rules that nullify applications already accepted for filing, or new law or treaty would render useless a grant or other positive disposition of the application.
- (5) When a waiver is granted in accordance with this subpart. . . .
- (6) When an application for new or modified facilities is not timely filed in accordance with the filing window as established by the Commission in a public notice specifying the earliest and latest dates for filing such applications.

the public interest would be best served by not subjecting these applicants to any further delay in the final disposition of their applications, particularly when Congress already has acted on the broader issue of the Commission's use of lotteries.

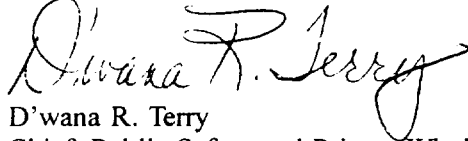
IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that, as of the adopted date of this *Order*, pursuant to Section 309(i)(5) of the Communications Act of 1934, 47 U.S.C. § 309(i)(5), as amended by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), all pending MAS applications for use of the 932-932.5/941-941.5 MHz bands (File Nos. A00001-A50772) **ARE DISMISSED** without prejudice.

8. **IT IS FURTHER ORDERED** that no new applications for use of the 932/941 MHz bands will be accepted for filing until the Commission or the Wireless Telecommunications Bureau, acting under delegated authority, announces new filing procedures.

9. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "D'wana R. Terry", is written over the printed name.

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau